

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ROBERT A. SLOVAK,

v.

Plaintiff,

3:13-cv-00569-MMD-CLB

GOLF COURSE VILLAS
HOMEOWNERS' ASSOCIATION;
GOLF COURSE VILLAS LIMITED
PARTNERSHIP; WELLS FARGO
BANK, N.A., *et al.*,

Defendants.

ORDER

GOLF COURSE VILLAS
HOMEOWNERS' ASSOCIATION;
GOLF COURSE VILLAS LIMITED
PARTNERSHIP; WELLS FARGO
BANK, N.A., *et al.*,

Defendants.

Currently before the court are motions filed by both parties. First, Defendant Wells Fargo Bank, N.A. (“Wells Fargo”) filed a motion for attorneys’ fees and costs (the “Fees Motion”), seeking its costs and fees in defending Plaintiff Robert Slovak’s (“Slovak”) previously filed motion for sanctions (the “Sanctions Motion”). (ECF No. 263.) Slovak opposed the motion, (ECF No. 269), and Wells Fargo replied. (ECF No. 270).¹

In addition, Slovak filed a motion to strike the Fees Motion. (ECF No. 268.) Wells Fargo opposed this motion, (ECF No. 271), and Slovak replied. (ECF No. 277.) The court has thoroughly reviewed the various filings related to both motions, and for the reasons stated below, the court denies Wells Fargo's motion for attorneys' fees and costs, (ECF No. 263), and denies Slovak's motion to strike as moot. (ECF No. 268.)

111

111

111

¹ Slovak also filed a motion for leave to file a sur-reply to the Fees Motion, which he later withdrew. (ECF Nos. 273, 276).

1 **I. BACKGROUND AND PROCEDURAL HISTORY**

2 A. Facts and Procedural History Regarding Settlement Agreement

3 This case has a long and tortured history that dates back to 2002 when Wells
4 Fargo provided Slovak a home equity loan on property in Incline Village, Nevada. To
5 complete this transaction, Slovak signed and executed a note and “Deed of Trust” for the
6 benefit of Wells Fargo, which was recorded in April 2002. Slovak failed to keep up the
7 payments and ultimately defaulted on the loan.

8 Following his default, Slovak sued Wells Fargo and various other defendants in
9 state court alleging claims for quiet title and declaratory relief. Wells Fargo removed the
10 case to federal court. (ECF No. 1.) After extensive litigation, the parties participated in a
11 settlement conference on June 3, 2014. (ECF No. 83.) At the conclusion of the
12 settlement conference, the parties reached an agreement requiring Slovak to pay
13 \$280,000 to Wells Fargo in return for a reconveyance of the property from Wells Fargo.

14 Trouble quickly arose when the parties could not agree on the language and
15 terms to be included in a written settlement agreement. (See ECF Nos. 91, 102.) The
16 dispute centered on Slovak’s claim that the terms of settlement agreement required
17 Wells Fargo to return the “original” note and Deed of Trust to him prior to him providing
18 Wells Fargo with payment. (ECF No. 102.) Wells Fargo disagreed asserting that
19 references to returning the note and Deed of Trust meant only that Wells Fargo would
20 reconvey title to Slovak. Ultimately, Wells Fargo filed a motion to enforce the terms of
21 the settlement agreement, which the district court granted. (ECF No. 107, 128.) Slovak
22 appealed the district court’s decision to the Ninth Circuit Court of Appeals, who reversed
23 and remanded for further proceedings. (ECF No. 140.)

24 B. Facts and Procedural History Following Remand

25 Following remand, Slovak filed a motion to enforce the settlement agreement,
26 arguing that the Ninth Circuit’s decision required Wells Fargo to provide the “original”
27 documents to him. (ECF No. 156.) At this time, Slovak was represented by Tory
28 Pankopf (“Pankopf”). Wells Fargo claimed it located the original documents and agreed

1 to provide them to Slovak to enforce the original settlement terms. (ECF No. 165.)
2 Ultimately, the court ordered the parties to meet and consummate the settlement
3 agreement and instructed the parties to sign and file a written release of liability and
4 stipulate to dismiss the action once Wells Fargo provided the document and Slovak
5 provided payment. (ECF No. 215, at 14-16.)

6 On May 10, 2018, the court held a status conference to determine whether the
7 settlement had been completed. (ECF No. 180, Hr'g Minutes; ECF No. 213, Hr'g
8 Transcript.) The parties advised the court Slovak had concerns with the authenticity of
9 the “original” documents and wanted the documents forensically examined to determine
10 whether they were truly “originals.” (ECF No. 213 at 3-5.) The court granted Slovak thirty
11 days to conduct the requested forensic analysis. (*Id.* at 29.) The parties were ordered to
12 either file a stipulation and order to dismiss the case on or before June 20, 2018, or to
13 appear for a hearing that would be set on that same day, if the settlement was not
14 completed. (*Id.* at 31-33; see also ECF No. 193.)

15 On June 20, 2018, the parties reconvened for another hearing. At this time,
16 Slovak’s attorney, Pankopf, claimed the forensic examination conducted on the
17 documents “irrefutably” established the documents were “forgeries” and Wells Fargo had
18 perpetrated a fraud on the court. (ECF No. 202, Hr'g Minutes; ECF No. 214 at 3, Hr'g
19 Transcript.) His claims were based upon two expert reports he received prior to the
20 hearing but did not provide to the court or opposing counsel. (ECF No. 214 at 5-6.)
21 Based on the seriousness of Slovak’s accusation, but without any evidence to review,
22 the court concluded it could not rule on the outstanding motion to enforce settlement
23 until it had an opportunity to consider the allegations made by Slovak. (*Id.* at 15-16.)
24 Slovak then withdrew his motion to enforce without prejudice, indicating he wanted to
25 proceed by filing a motion for sanctions. (*Id.* at 17.) The court ordered Pankopf to file the
26 Sanctions Motion on or before Friday, July 6, 2018. (*Id.* at 214; ECF No. 202.)

27 ///

28 ///

1 C. The Sanctions Motion

2 Pankopf did not file the motion on time; rather, he filed a motion for an extension
3 of time requesting a seven-day extension to July 13, 2018, stating he was “almost
4 finished with the motion and [he would] be able to file it as requested.” (ECF No. 207
5 at 1.) Pankopf indicated he had two legal issues to finish researching and a few exhibits
6 to identify prior to filing. (*Id.*) The court granted Slovak’s request. (ECF No. 208.)

7 When July 13, 2018 arrived, Pankopf again failed to file the motion – instead filing
8 another request for an extension. (ECF No. 209.) This time, Pankopf claimed he had
9 now “concluded a motion pursuant to Rule 11 [was] appropriate” and he needed more
10 time to comply with the safe harbor provisions required under the rule. (ECF No. 209
11 at 1.) He requested an extension of 35 days, which included 21 days to comply with the
12 safe harbor provision and an additional 14 days to file the motion, resulting in a new
13 deadline of August 16, 2018. (*Id.* at 2.) The court granted the request over Wells Fargo’s
14 objection. (ECF Nos. 210, 211.)

15 On July 19, 2018, Pankopf sent a letter to Wells Fargo’s counsel including a
16 document entitled, “Motion for Rule 11 Sanctions.” (ECF No. 223, Ex. F.) The enclosed
17 motion was only five pages long and argued for sanctions under a single legal theory –
18 Rule 11. (*Id.* at 3-7.) Pankopf asserted he was providing the enclosed motion pursuant
19 to the safe harbor provision of Rule 11. (*Id.* at 2.) He further stated if Wells Fargo did not
20 “voluntarily produce the original note and original Deed of Trust within 21 days of service
21 of the letter and draft motion,” he would file the document seeking sanctions against
22 Wells Fargo. (*Id.*) Wells Fargo responded on August 10, 2018, asserting the motion was
23 unfounded and detailed the various deficiencies in Slovak’s accusations. (ECF No. 223,
24 Ex. G.)

25 On August 17, 2018, Slovak, through Pankopf, filed the Sanctions Motion. (ECF
26 No. 218.) The motion sought sanctions against Wells Fargo, the law firm of Snell &
27 Wilmer, LLP (“Snell”), and individual Snell attorneys, based on his claim that Wells Fargo
28 failed to provide “original copies” of the note and Deed of Trust as required by the

1 parties' previous settlement agreement. (ECF No. 218.) The Sanctions Motion that was
2 filed was not the same motion served upon Wells Fargo and its counsel. (Compare ECF
3 No. 218 *with* ECF No. 223, Ex. F at 3-7.) Rather, the filed motion was approximately 11
4 pages in length and sought sanctions under three separate legal theories: Rule 11,
5 28 U.S.C. § 1927, and the court's inherent powers. (See ECF No. 218.)

6 The overarching contention in the Sanctions Motion was Slovak's argument that
7 Wells Fargo and its counsel failed to provide "original copies" of the note and Deed of
8 Trust as required by the parties' previous settlement agreement. (ECF No. 218.) Slovak
9 claimed the documents Wells Fargo and its counsel tendered as "originals" were, "at
10 best copies or at worst fabricated forgeries." (*Id.* at 10.) Slovak's argument was
11 premised entirely upon the alleged expert reports and opinions provided by Dr. James E.
12 Kelley and Gary Michaels, who Slovak proffered as experts in the field of forensic
13 document examination. Slovak offered the C.V.s of Dr. Kelley and Mr. Michaels, as well
14 as their respective expert reports, as evidence to support his contentions. (See ECF No.
15 218, Exs. 8-11.)

16 Wells Fargo opposed the Sanctions Motion on August 31, 2019, specifically
17 challenging Slovak's expert witnesses. (ECF No. 222.) Wells Fargo asserted Slovak's
18 experts must be rejected because neither witnesses' testimony or opinions satisfied the
19 requirements of the Federal Rules of Evidence 702 or *Daubert*². (*Id.* at 7-10.) According
20 to Wells Fargo, without these expert opinions and reports, there was no evidence in the
21 record to support a finding that the documents tendered were not the originals. After
22 requesting another extension of time (ECF No. 224), Slovak filed his reply on September
23 11, 2018, providing a list of cases where Dr. Kelley supposedly "opined" on the validity of
24 his expert findings. (ECF No. 225 at 3-4.)

25 After the Sanctions Motion was fully briefed, attorney Scott D. Johannessen
26 ("Johannessen") petitioned the court to practice *pro hac vice* as counsel for Slovak,

28² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

1 which was approved. (ECF No. 228, 232.) Pankopf remained as co-counsel. (ECF
2 No. 232.)

3 Due to the seriousness of Slovak's allegations, the court ordered an evidentiary
4 hearing to determine whether the expert opinions and reports offered by Slovak satisfied
5 Rule 702 and *Daubert*. This hearing was held on November 28, 2018. (ECF No. 244,
6 Hr'g Minutes; ECF No. 249, Hr'g Transcript.) The court heard testimony of Dr. Kelley
7 regarding his qualifications and his expert opinions. (*Id.*) Both parties submitted various
8 exhibits supporting their respective positions, some of which were admitted.

9 On January 15, 2019, the court issued its order denying the Sanctions Motion.
10 (ECF No. 250.) The court analyzed whether the experts and their opinions satisfied the
11 requirements of Rule 702 and *Daubert* and its progeny. (*Id.* at 11-22.) First, the court
12 determined Dr. Kelley was not a qualified expert in the area of forensic document
13 examination. (*Id.* at 13.) However, the court noted that even if Dr. Kelley could qualify as
14 an expert, his expert reports and his opinions were not supported by scientifically reliable
15 or accepted methods or principles and were not admissible. (*Id.* at 18.) The court also
16 excluded Mr. Michaels as an expert and likewise rejected his report. The court
17 determined that his opinions were not "expert" opinions, but rather opinions that Dr.
18 Kelley's opinions were correct. (*Id.* at 21.) The court held this was little more than an
19 attempt to bolster Dr. Kelley's credibility by legitimizing the "opinions" reached by him –
20 which is not a proper basis for expert testimony. (*Id.* at 21-22.) Accordingly, the court
21 held there was no evidence to support Slovak's motion that Wells Fargo produced fake
22 or forged documents.

23 At the November hearing, Slovak requested the court bifurcate the ultimate issue
24 of whether there was evidence that the documents were, in fact, originals. (ECF Nos.
25 244 at 4, 249 at 204.) Slovak argued that even if the court denied the Sanctions Motion
26 or rejected his experts, there was still no evidence in the record that the documents were
27 in fact originals and the court should hold an additional hearing to make a factual finding
28 on this issue. (ECF No. 249 at 204.) He asserted there may still be a basis to contest

1 that the documents were originals – even without his expert testimony. (*Id.* at 227.) The
2 court agreed to the requested bifurcation and set a second hearing for February 7-8,
3 2019. (ECF Nos. 244 at 5, 249 at 243.)

4 Prior to that hearing, the court issued a second order vacating the February
5 hearing and ordering Slovak to deposit \$280,000 to be held in an interest-bearing
6 account, with the Clerk of Court on or before Monday, March 25, 2019 pursuant to
7 LR 67-1 and 67-2. (ECF No. 251.) The court stated that based on its January 15, 2019
8 ruling (ECF No. 250), no evidence existed in the record supporting any contention the
9 documents tendered by Wells Fargo were *not* the originals. (ECF No. 251 at 2.) Rather,
10 this assertion appeared to be based upon Slovak’s attorneys’ suggestion that the
11 documents may still be copies and no evidence existed to show the documents were, in
12 fact, originals. (*Id.*) Whether Slovak’s assertion had merit or not, the court determined
13 Wells Fargo had tendered the documents it contended were the originals and
14 established that it stood ready, willing, and able to finalize the terms of the settlement
15 agreement upon an order of the court to do so. (*Id.*) However, the same could not be
16 said for Slovak. (*Id.*) Over eight years had elapsed since the time the parties originally
17 entered into the settlement agreement and it was unclear whether Slovak was ready,
18 willing, and able to immediately pay Wells Fargo \$280,000 upon an order of the court.
19 (*Id.*) Therefore, prior to conducting any additional hearings or utilizing any additional
20 resources of the court or the parties, the court ordered Slovak to deposit the required
21 funds in the court’s trust account. (*Id.* at 3.) To date, Slovak has not complied with the
22 court’s order.

23 D. The Fees Motion

24 On January 29, 2019, Wells Fargo filed a motion for a scheduling order to move
25 for attorneys’ fees and costs. (ECF No. 252.) Wells Fargo specifically requested the
26 court issue a scheduling order allowing them up to and including March 8, 2019 to file
27 the Fees Motion incurred defending against the Sanctions Motion. (*Id.* at 2.) Wells Fargo
28 stated it did not believe the time to move for fees and costs under these circumstances

1 was governed by any specific time limit, however, it requested a scheduling order out of
2 “an abundance of caution to establish certainty and avoid any potential dispute about the
3 timeliness of such a motion.” (*Id.*) The court granted Wells Fargo’s request for a briefing
4 schedule and ordered the motion to be filed on or before March 8, 2019.

5 On February 2, 2019, Slovak filed his notice of appeal of the court’s decision on
6 the Sanctions Motion. (ECF No. 254.) Subsequently, Wells Fargo filed a motion for an
7 extension of the scheduling order to file their Fees Motion. (ECF No. 258.) On March 25,
8 2019, the court denied Wells Fargo’s motion to extend the scheduling order because it
9 determined that the appeal divested the court of jurisdiction to rule on issues related to
10 the Sanctions Motion while Slovak’s appeal was pending – including the question of
11 whether fees and costs should be assessed. (ECF No. 259.) Ultimately, the Ninth Circuit
12 declined jurisdiction over Slovak’s appeal on June 24, 2019 (ECF No. 260), and the
13 mandate issued on July 16, 2019 (ECF No. 261).

14 On November 26, 2019, several months after the mandate issued, Wells Fargo
15 filed the Fees Motion. (ECF No. 263). Wells Fargo argues the Sanctions Motion
16 “stem[med] from a baseless sanctions assault” against Wells Fargo, Snell, and individual
17 Snell attorneys, who purportedly “produced ‘fabricated forgeries’ in connection with a
18 ‘forensic inspection’ of [Slovak’s] loan documents.” (*Id.* at 2.) Wells Fargo argues there
19 are two bases to award attorney’s fees and costs, the court’s inherent authority to
20 sanction Slovak for his bad faith conduct for filing the Sanctions Motion and pursuant to
21 28 U.S.C. § 1927. (*Id.* at 8, 13.)

22 Slovak opposes the Fees Motion arguing the motion should be denied because
23 the court “never passed on the efficacy or weight of Dr. Kelley’s forensic opinions” only
24 passing on the admissibility of Dr. Kelley’s testimony, and as such Slovak cannot be
25 sanctioned by the court for relying in good faith on the credentials of a forensic expert
26 rejected by the court. (ECF No. 269 at 3.) Essentially, Slovak asserts “the court may
27 have dismissed the messenger, but it did not dismiss the message” and the “highly
28 detailed and technical opinions” of Dr. Kelley “were never entertained” by the court in its

1 January 15, 2019 disqualification order. (*Id.* at 2.) Slovak's opposition reiterates the
2 same arguments made during the Sanctions Motion hearing regarding Dr. Kelley's
3 qualifications as an expert witness. (*Id.* at 6-8.) Finally, Slovak's opposition alleges the
4 Fees Motion erroneously attempts to impose § 1927 sanctions against Slovak, a party to
5 the litigation. Wells Fargo replied on January 17, 2020. (ECF No. 270.)³

6 E. Slovak's Motion to Strike

7 Prior to filing his opposition, Slovak filed a motion to strike the Fees Motion on the
8 basis that it violates the Federal Rules of Civil Procedure, the Local Rules, and is
9 untimely and should be summarily stricken for various reasons. (ECF No. 268 at 1.)
10 Wells Fargo opposed Slovak's motion to strike arguing: (1) the rule on which the motion
11 to strike is based (Federal Rule of Civil Procedure 54(d)) is not applicable to the Fees
12 Motion because it does not seek an award following the entry of a final judgment; (2)
13 Rule 54(d) expressly excepts any request for sanctions under 28 U.S.C. § 1927, which
14 is, in part, the basis of Wells Fargo's motion; and, (3) Slovak misstates the basis of the
15 court's denial of Wells Fargo's request for extending the scheduling order dates in filing
16 the fees motion by insinuating that the court denied it on the merits of the request. (*Id.*
17 at 1-2.) Slovak replied on January 27, 2020. (ECF No. 277.)

18 On January 21, 2020, Johannessen filed an affidavit in support of the motion to
19 strike Wells Fargo's § 1927 claim for attorneys' fees against him personally because he
20 did not become attorney of record until *after* the Sanctions Motion was filed. (ECF
21 No. 272.) Johannessen filed an errata on February 6, 2020, requesting a hearing to

22 ³ Slovak filed a motion for leave to file a sur-reply to the Fees Motion on January
23 23, 2020, (ECF No. 273), however, he later withdrew this motion. (ECF No. 276.) On
24 January 28, 2020, Slovak filed a document entitled, "Robert Slovak's Objections to and
25 Request to Strike Unsupported Claim for Attorneys' Fees and Costs." (ECF No. 278.)
26 This document is plainly a "sur-reply" labeled by a different name. Pursuant to Local
27 Rule 7-2(g) a "party may not file supplemental pleadings, briefs, authorities, or evidence
28 without leave of court granted for good cause. The judge may strike supplemental filings
made without leave of court." Accordingly, Slovak's document of objections and request
to strike unsupported claim for attorneys' fees and costs (ECF No. 268) is stricken from
the record as an improper filing without leave of court under both LR 7-2(b) and (g).

1 address the matters related to Johannessen's affidavit in connection with the two
2 motions presently before the court. (ECF No. 279.)

3 **II. DISCUSSION**

4 Wells Fargo has moved for attorneys' fees and costs under two legal theories:
5 (1) the court's inherent authority; and (2) 28 U.S.C. § 1927. Each argument will be
6 addressed in turn.

7 A. Court's Inherent Authority

8 Wells Fargo asserts that the court should order Slovak to pay its fees and costs,
9 pursuant to its inherent authority, as a sanction in defending against the Sanctions
10 Motion it claims Slovak filed in bad faith. Wells Fargo argues evidence of Slovak's bad
11 faith is demonstrated by Slovak's: (1) reliance on Dr. Kelley's "expert" report and Mr.
12 Michaels's opinion on Dr. Kelley's report as basis for sanctions; and, (2) filing a different
13 motion than the one previously provided to Wells Fargo under Rule 11's safe harbor
14 provision and misrepresenting that fact to the court. (ECF No. 263.)

15 Slovak's opposition asserts that sanctions cannot be assessed for relying in good
16 faith on the credentials of forensic experts rejected by the court and that the Rule 11
17 motion served on Wells Fargo provided sufficient notice as to the Rule 11 issues
18 asserted by Slovak — regardless of whether additional theories for sanctions were
19 added to the motion later. (ECF No. 269.)

20 A federal district court also has inherent authority to sanction conduct abusive of
21 the judicial process. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). This
22 power, however, is to be exercised with restraint and discretion. *Id.* at 44. Inherent
23 power sanctions may be imposed against attorneys, clients, and *pro se* litigants.
24 *Aleksy Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). The
25 court's "inherent power 'extends to a full range of litigation abuses.'" *Fink v. Gomez*, 239
26 F.3d 989, 992 (9th Cir. 2001) (quoting *Chambers*, 501 U.S. at 46-47).

27 The court has discretion to rely on its inherent powers rather than a federal rule
28 or statute. *Fink*, 239 F.3d at 994 (citing *Chambers*, 501 U.S. at 50). Under its inherent

1 power, sanctions may include fines (see *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469,
2 1472-73 (D.C. Cir. 1995)); awards of attorneys' fees and expenses (see *Roadway*
3 *Express Inc. v. Piper*, 447 U.S. 752, 765 (1980)), and contempt citations (*id.* at 764).
4 Again, it is clear that "one permissible sanction" under the court's inherent power is "an
5 assessment of attorney's fees" "instructing a party that has acted in bad faith to
6 reimburse the legal fees and costs incurred by the other side." *Goodyear Tire & Rubber*
7 *Co. v. Haeger*, 137 S.Ct. 1178, 1186 (2017).

8 "Before imposing sanctions under its inherent sanctioning authority, a court must
9 make an explicit finding of bad faith or willful misconduct." *In re Dyer*, 322 F.3d 1178,
10 1196 (9th Cir. 2003); see also *Fink*, 239 F.3d at 993-94. Recklessness, when combined
11 with an additional factor such as frivolousness, harassment, or an improper purpose,
12 may support sanctions. See *In re Girardi*, 611 F.3d 1027, 1061 (9th Cir. 2010); *Gomez*
13 *v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001); *Fink*, 239 F.3d at 994. Mere
14 negligence or recklessness alone will not suffice. *In re Lehtinen*, 564 F.3d 1052, 1058
15 (9th Cir. 2009). "[S]anctions are available if the court specifically finds bad faith or
16 conduct tantamount to bad faith." *Fink*, 239 F.3d at 994. An attorney's bad faith is
17 assessed under a subjective standard, and "is present when an attorney knowingly or
18 recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of
19 harassing an opponent." *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 436 (9th Cir.
20 1996) (quotation and citation omitted).

21 Wells Fargo points to two primary bases to establish Slovak's "bad faith": (1) his
22 reliance on his retained experts; and, (2) the service of a Rule 11 motion on opposing
23 counsel under the safe harbor provisions that was different from the Sanction Motion
24 that was ultimately filed.

25 ///

26 ///

27 ///

28 ///

1 1. *Reliance on Retained Experts*

2 Wells Fargo alleges that Slovak's reliance on the opinions of Dr. Kelley and Mr.
3 Michaels was done in bad faith. (ECF No. 263 at 9-11.) However, Wells Fargo's motion
4 does not specify whether Slovak's attorneys and/or Slovak himself individually, should
5 be sanctioned under this theory. (*Id.*) Regardless, the court cannot conclude that either
6 Slovak or his counsel, Pankopf, filed the Sanctions Motion in bad faith. The court is not
7 convinced that Slovak did not have any reasonable or good faith basis to believe in the
8 merits of his position. It appears Slovak and Pankopf relied upon the alleged "expert"
9 reports and opinions of Dr. Kelley and Mr. Michaels who were proffered as experts in
10 the field of forensic document examination. Although Slovak's experts were ultimately
11 rejected by the court, and may have been rejected by other courts, this does not mean
12 that Slovak or Pankopf did not have a basis to reasonably believe the documents
13 tendered by Wells Fargo were not the original copies of the note and Deed of Trust as
14 required by the settlement agreement. Reasonable minds can differ on expert opinions
15 offered by parties, and the court finds that Slovak's reliance on Dr. Kelley's opinion,
16 while questionable, does not mean that the Sanctions Motion was filed without any
17 basis in law or fact, nor does it mean that Slovak's sole purpose in filing the motion was
18 to harass Wells Fargo. Although the court disagrees with many of Slovak's and his
19 attorneys' actions, the court simply is not convinced that they engaged in willful
20 misconduct such that it supports a finding of bad faith.

21 2. *Slovak's Rule 11 Violation*

22 Wells Fargo also alleges that Slovak's failure to comply with the requirements of
23 Rule 11's safe harbor provisions is tantamount to bad faith. (ECF Nos. 263 at 11-13,
24 270 at 5-8.) Federal Rule of Civil Procedure 11 provides that when an attorney signs a
25 pleading, motion or other paper and presents it to the court, the attorney certifies that it
26 "is not being presented for any improper purpose;" "the claims, defenses, and other
27 legal contentions are warranted by existing law or by a nonfrivolous legal argument for
28 extending, modifying, or reversing existing law or for establishing new law;" "the factual

1 contentions have evidentiary support or, if specifically so identified, will likely have
2 evidentiary support after a reasonable opportunity for further investigation or discovery;"
3 and, "denials of factual contentions are warranted on the evidence or... reasonably
4 based on a belief or lack of information." Fed. R. Civ. P. 11(a), (b)(1)-(4).

5 A motion under Rule 11 must be made separately and describe the conduct that
6 violates the rule. Fed. R. Civ. P. 11(c)(1). It must be served under Rule 5 and the
7 offending attorney or party has 21 days to withdraw or correct the challenged paper,
8 claim, defense, contention or denial. Fed. R. Civ. P. 11(c)(2). If the matter is not
9 withdrawn or corrected within 21 days, the party may then file the Sanctions Motion.
10 Fed. R. Civ. P. 11(c)(2).

11 Wells Fargo argues that Rule 11 requires the motion served on the nonmoving
12 party and the filed motion be the same. (ECF No. 263 at 11-12.) However, Slovak did
13 not do so. Rather, he provided a different motion than the Sanctions Motion he actually
14 filed. Slovak asserts he followed Rule 11's procedural requirements by serving the Rule
15 11 motion on Wells Fargo within the 21-day time period required and that Wells Fargo's
16 argument that Rule 11's safe harbor provision requires service of identical motions is
17 unfounded. (ECF No. 269 at 10-12.) Presently, the issue of whether the safe harbor
18 provision requires the motion served and the motion filed to be identical is one that has
19 yet to be explicitly addressed by the Ninth Circuit and neither Wells Fargo nor Slovak
20 have provided the court with clear precedent from this district.

21 District courts within the Ninth Circuit have come to different conclusions on the
22 matter. *Compare Rygg v. Hulbert*, No. C11-1827JLR, 2012 WL 12847008, at *3 (W.D.
23 Wa. Sept. 21, 2012) (holding that the procedural requirements of Rule 11 are satisfied
24 even where "the motion served to satisfy the safe harbor requirements is different from
25 the motion filed with the court, so long as the filed motion does not raise any new
26 arguments."); *Shared Med. Res., LLC v. Histologics, LLC*, 2013 WL 12138991, at *4
27 (C.D. Cal. May 23, 2013) (finding that the authorities cited by Plaintiff for the proposition
28 that counsel must be served with a "filling-ready motion" in *Truesdell* was not supported

1 by any cited authority), *with Gidding v. Anderson*, 2009 WL 1631625 at *1 (N.D.Cal.
2 June 9, 2009) (denying defendants' Rule 11 sanctions motion because “[d]efendants
3 filed with the Court a motion that includes a memorandum of points and authorities,
4 supporting declarations and exhibits that defendants did not serve at the outset of the
5 safe harbor period”); *O'Connell v. Smith*, 2008 WL 477875 at *2 (D. Ariz. Feb. 12, 2008)
6 (rejecting the argument that a draft motion raising similar bases for sanctions satisfied
7 Rule 11(c)(2) and holding that Ninth Circuit law required the actual motion be served”).
8 However, this district addressed the issue in an unpublished opinion, *MetLife Bk., N.A.*
9 *v. Riley*, 2010 WL 4024898, at *3 (D. Nev. Oct. 13, 2010), noting that “courts find that
10 failure to ‘serve a copy of the full motion that will be filed with the court’ does not satisfy
11 the safe harbor provision.”

12 Given that the Ninth Circuit has yet to address this issue and there appears to be
13 a split of authority within the district courts, it is reasonable that Slovak understood the
14 procedural requirement for serving a Rule 11 motion to mean something different than
15 Wells Fargo. Therefore, the court cannot conclude that serving Wells Fargo with a
16 different motion from the Sanctions Motion is sufficient to constitute bad faith conduct.
17 Thus, without a finding of bad faith, the court declines to impose sanctions of attorneys'
18 fees and costs based on its inherent authority.

19 B. 28 U.S.C. § 1927

20 Wells Fargo also seeks attorneys' fees and costs pursuant to 28 U.S.C. § 1927.
21 (ECF Nos. 263 at 13-14, 270 at 8-9.) Wells Fargo argues that this court has authority to
22 award its fees under 28 U.S.C. § 1927 for Slovak's bad faith in filing the Sanctions
23 Motion and challenging the authenticity of the loan documents. (*Id.*) Wells Fargo's
24 request for its attorneys' fees and costs pursuant to § 1927 is directed at Slovak's
25 counsel, Pankopf and Johannessen. (ECF No. 270 at 8.)

26 Section 1927 states:

27 Any attorney or other person admitted to conduct cases in any court of the
28 United States or any Territory thereof who so multiplies the proceedings in any
case unreasonably and vexatiously may be required by the court to satisfy

1 personally the excess costs, expenses, and attorneys' fees reasonably incurred
2 because of such conduct.

3 28 U.S.C. § 1927. Section 1927 sanctions can only be imposed against an attorney or
4 other person permitted to conduct cases in federal court. These sanctions may not be
5 imposed against a party to the litigation nor may they be imposed against a law firm.
6 See *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290 (9th Cir. 2015.) “The
7 purpose of § 1927 may be to deter attorney misconduct, or to compensate the victims of
8 an attorney's malfeasance, or to both compensate and deter.” *Haynes v. City & Cty. of*
9 *San Francisco*, 688 F.3d 984, 987 (9th Cir. 2012).

10 Section 1927’s language – “unreasonably and vexatiously” – “implies a bad faith
11 or intentional misconduct requirement not explicit in the statute.” *Barnd v. City of*
12 *Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982). Therefore, “[s]anctions pursuant to
13 section 1927 must be supported by a finding of subjective bad faith.” *Blixseth v.*
14 *Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1007 (9th Cir. 2015) (internal
15 quotation marks omitted). Among other circumstances, “bad faith is present when an
16 attorney knowingly or recklessly raises a frivolous argument.” *Id.* (internal quotation
17 marks and alteration omitted). An argument is frivolous if its resolution “is obvious” or
18 the argument is “wholly without merit.” *Nat'l Mass Media Telecomm. Sys., Inc. v.*
19 *Stanley*, 152 F.3d 1178, 1181 (9th Cir. 1998) (internal quotation marks omitted).

20 Sanctions under § 1927 are appropriate upon a finding that an attorney
21 “recklessly or intentionally misled the court.” *Girardi*, 611 F.3d at 1061. Thus, § 1927
22 sanctions require bad faith or something akin to bad faith, i.e., recklessness plus
23 something more such as frivolousness or an improper purpose. See *Moore v. Keegan*
24 *Mgmt. Co.*, 78 F.3d 431, 436 (9th Cir. 1996); *Pac. Harbor Capital, Inc. v. Carnival Air*
25 *Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000); *B.K.B. v. Maui Police Dep’t*, 276 F.3d
26 989, 993-94 (9th Cir. 2001). A court retains “substantial leeway” when determining
27 whether to impose § 1927 sanctions. *Haynes*, 688 F.3d at 987.

1 First, to the extent Wells Fargo seeks attorneys' fees and costs against
2 Johannessen, the court finds that this is inappropriate. It is undisputed that
3 Johannessen did not make an appearance in this case until well after Slovak retained
4 his two experts and Pankopf filed the Sanctions Motion. (ECF No. 232.) There is no
5 evidence Johannessen participated in any of these actions or that he was involved in
6 any of the decisions leading to the filing of the Sanctions Motion. Rather, Johannessen
7 entered the case after the Sanctions Motion was fully briefed. His only involvement
8 relative to the Sanctions Motion was his participation in the hearing ordered by the court.
9 Therefore, the court rejects the contention that sanctions would be proper against
10 Johannessen under these circumstances.

11 Second, the court is not convinced that Pankopf, as counsel for Slovak, acted in
12 bad faith in filing the Sanctions Motion or in pursuing the arguments he made on behalf
13 of Slovak, as explained above. The court disagreed with his position and denied his
14 motion. Although Pankopf's actions or strategic decisions may not comport with how
15 others would litigate a case, this does not provide sufficient evidence to conclude that
16 Pankopf intentionally misled the court by filing and prosecuting the Sanctions Motion or
17 acted in bad faith in doing so. Simply put, Pankopf's actions and questionable strategic
18 decisions do not rise to the level of "knowledge" to infer intentional conduct intended to
19 mislead the court. Pankopf's conduct does not warrant sanctions at this time.
20 Therefore, the court denies the Fees Motion in its entirety.

21 C. Slovak's Motion to Strike

22 Based on the court's denial of the Fees Motion, Slovak's motion to strike is denied
23 as moot.

24 **III. CONCLUSION**

25 The court notes that the parties made several arguments and cited to several
26 cases not discussed above. The court has reviewed these arguments and cases and
27 determines that they do not warrant discussion as they do not affect the outcome of the
28 issues before the court.

For the reasons stated above, Wells Fargo's motion for attorneys' fees and costs (ECF No. 263) is **DENIED**.

In addition, Slovak's motion to strike (ECF No. 268), is **DENIED** as moot.

Finally, Slovak's motion for leave to file a sur-reply (ECF No. 273), is **DENIED** as moot and Slovak's later filed objections (ECF No. 278), are **STRICKEN** from the record.

IT IS SO ORDERED.

DATED: February 26, 2020.

UNITED STATES MAGISTRATE JUDGE